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Commonwealth of Kentucky
Kentucky Supreme Court

No. 2008-SC-000236

KENNETH PATTERSON **APPELLANT**

Appeal from Fulton Circuit Court
v. Hon.Charles W. Boteler, Jr., Judge
Indictment No. 06-CR-00034

COMMONWEALTH OF KENTUCKY **APPELLEE**

Brief for Commonwealth

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CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been mailed this 8th day of January, 2009, to Hon. Charles W. Boteler, Jr., Judge, Fulton Circuit Court,114 E. Wellington Street, P.O. Box 167, Hickman, Kentucky 42050; Hon. Michael B. Stacy, P. O. Box 788, 133 N. 4th Street, Wickliffe, Ky., 42087; Hon. Robin Irwin, Dept. Of Public Advocacy, 503 N. 16th Street, Murray, Kentucky 42071; hand delivered to Samuel N. Potter, Assistant Public Advocate, Department of Public Advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Ky. 40601.

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INTRODUCTION

Appellant appeals as a matter of right from a judgment finding him guilty of rape in the first degree and persistent felony offender in the second degree. He raises a number of issues on appeal, including a request that this Court modify or abrogate the holding of *Hall v. Commonwealth*, 956 S.W.2d 224 (Ky. App. 1997), which concerns the standard for admissibility under KRS 412 of other accusations of sexual abuse made by the victim in a sexual abuse or rape case.

STATEMENT CONCERNING ORAL ARGUMENT

Undersigned counsel agrees with Appellant that this case is probably a good candidate for oral argument in light of Appellant's request to change the law.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION i

Hall v. Commonwealth,
956 S.W.2d 224 (Ky. App. 1997) i

KRS 412 i

STATEMENT CONCERNING ORAL ARGUMENT ii

COUNTERSTATEMENT OF POINTS AND AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 1

ARGUMENT 2

I. The Trial Court Properly Refused to Admit Hearsay Contained in a Social Workers's Report 2

KRS 803(3) 2

Souder v. Commonwealth,
719 S.W.2d 730, 734 (Ky. 1986) 3

KRS 803(6) 3

Prater v. Cabinet for Human Resources, Commonwealth of Kentucky,
954 S.W.2d 954 (Ky. 1997) 3

KRS 803(6) 3

A. Ms. White's Opinion of CAH's Veracity does not fall within the State-of-Mind Exception of KRS 803(3) 4

Hampton v. Commonwealth,
133 S.W.3d 438 (Ky. 2004) 4

Crowe v. Commonwealth,
38 S.W.3d 379 (Ky. 2001)) 4

Ragland v. Commonwealth,
191 S.W.3d 569, 587 (Ky. 2006) 5

Bussey v. Commonwealth,
797 S.W.2d 483, 486 (Ky. 1990) 5

B. Ms. White's Opinion of CAH's Veracity does not fall within the Business-Record Exception of KRS 803(6) 5

Matthews v. Commonwealth,
163 S.W.3d 11 (Ky. 2005) 5

Kirk v. Commonwealth,
6 S.W.3d 823 (Ky. 1999) 5

KRS 803(6) 5

Mathews, 163 S.W.3d at 21 5

KRS 803(6) 5

Kirk, 6 S.W.3d at 828 6

II. The Court should Decline Appellant's Invitation to Modify *Hall v. Commonwealth* 6

Hall v. Commonwealth,
956 S.W.2d 224 (Ky. App. 1997) 6

Hall, 956 S.W.2d at 227 7

Partin v. Commonwealth,
918 S.W.2d 219, 222 (Ky. 1996) 7

Chestnut v. Commonwealth,
250 S.W.3d 288, 295 (Ky. 2008) 7

KRE 412 7

Taylor v. Morris,

62 S.W.3d 377, 379 (Ky. 2001) 8

Quinn v. Haynes,
234 F.3d 837 (4th Cir. 2000) 8

Hughes v. Raines,
641 F.2d 790, 792 (9th Cir.1981) 8

United States v. Stamper,
766 F.Supp. 1396, 1403 n. 3 (W.D.N.C.1991), aff'd 959 F.2d 231, 1992
WL 63334 (4th Cir.1992) 8

Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*,
70 Minn.L.Rev. 763, 861 (1986) 8

Quinn v. Haynes,
234 F.3d 837, 851 (4th Cir. 2000) 8

United States v. Cardinal,
782 F.2d 34, 36 (6th Cir.1986) 8

U.S. v. Withorn,
204 F.3d 790, 795 (8th Cir. 2000) 8

KRS 412 9

III. Lt. Duncan's Testimony was Proper Rehabilitation Testimony 9

Reed v. Commonwealth,
738 S.W.2d 818, 821 (Ky. 1987) 11

KRS 401 11

RCr 9.24. 12

Jarvis v. Commonwealth,
960 S.W.2d 466, 471 (Ky.1998) 12

IV. Miscellaneous Evidentiary Arguments 12

A. Introduction of the Tape Recording of Mr. Patterson's Message was not Palpable Error 12

i. **Portion of Tape Played without Objection** 12

RCr 10.26 13

ii. **Portion of Tape Played after Objection** 13

iii. **Palpable-Error Review Applies** 14

RCr 10.26 15

Martin v. Commonwealth, ... 15
207 S.W.3d 1, 4 (Ky. 2006)

B. **Dr. Shumaker's Testimony was Admissible** 15

Miller v. Eldridge,
146 S.W.3d 909, 914 (Ky. 2004) 16

Davis v. Commonwealth,
147 S.W.3d 709, 725 (Ky. 2004) 16

Scruggs v. Commonwealth,
566 S.W.2d 405, 409 (Ky. 1978) 16

KRS 401 16

Springer v. Commonwealth,
998 S.W.2d 439, 449 (Ky. 1999) 17

C. **Appellant's Requested Admonishment Cured any Error in Connection with Charles Johnson's Testimony** 18

Kennedy v. Commonwealth,
544 S.W.2d 219, 222 (Ky. 1976) 18

Commonwealth v. Duke,
750 S.W.2d 432, 433 (Ky. 1988) 18

Martin v. Commonwealth,
170 S.W.3d 374, 381 (Ky. 2005) 19

Clay v. Commonwealth,
867 S.W.2d 200, 204 (Ky.App. 1993) 19

D. The Trial Court Properly Admitted Testimony Regarding Appellant's Affection for Playing Particular Songs 19

V. The Trial Court Never had Cause to Question Appellant's Competency 20

KRS 504.100 21

Mills v. Commonwealth,
996 S.W.2d 473, 486 (Ky. 1999) 21

KRS 504.100(3) 21

Mills,
996 S.W.2d at 486 21

Drope v. Missouri,
420 U.S. 162, 180 (1975) 21

Pate v. Robinson,
383 U.S. 375, 385-86 (1966) 21

VI. There was no Prosecutorial Vindictiveness **22**
16C C.J.S., *Constitutional Law,* § 1531 23

Bordenkircher v. Hayes,
434 U.S. 357 (1978) 23

Commonwealth v. Leap,
179 S.W.3d 809, 814 (Ky. 2005) 23

VII. The Trial Court Properly Denied Appellant's Motion to Dismiss the Indictment 23

Jackson v. Commonwealth,
20 S.W.3d 906, 908 (Ky. 2000) 24

Kinser v. Commonwealth,
741 S.W.2d 648, 653 (Ky. 1987) 24

Palsgraf v. Long Island R. Co.,
162 N.E. 99, 99 (N.Y. 1928) 24

VIII. Appellant is not Entitled to an Evidentiary Hearing in Connection with Allegations of Irregularities with his Pre-Sentence Investigation Report 25

KRS 532.050 25

KRS 532.050(4) 25

KRS 532.050(6) 25

IX. Appellant Received a Fundamentally Fair Trial 26

CONCLUSION 26

KRS 412 26

COUNTERSTATEMENT OF THE CASE

The Commonwealth does not accept Appellant's statement of the case and sets forth its Counterstatement below.

Appellant was tried and convicted of the First-Degree Rape of CAH, who was thirteen years old at the time. Notwithstanding the implications in Appellant's Statement of the Case, CAH's mother, Mary Elizabeth Stevenson, was not a codefendant in Appellant's trial. She was not on trial. CAH was not on trial. Only Appellant was.

The trial revealed that CAH had a troubled and traumatic family life, which was made much worse by Appellant.

Appellant began dating CAH's mother in late 2004. At the time, CAH, her sister SP, her brother CP, and her mother were living in the Guest Inn in Fulton, KY. Appellant lived in the adjoining room. Early in 2005, CAH's family moved into an apartment. Appellant moved in with CAH's mother shortly thereafter. TR Vol. 7; 11/20/07 at 11:19:15-21:30.

Days and weeks prior to the rape, Appellant made a number of inappropriate comments to the then 13-year CAH, such as telling her that she "had a nice ass" and that she "would really make a man happy in bed." *Id.* at 11:28:00-40. Appellant waited until he had CAH alone in the house before acting on his desires.

He raped her while the rest of the family was at a boy scout blue-and-gold banquet for CP's troop. CAH wanted to go to the banquet but her mother refused to let her. *Id.* at 11:24:40-11:27-30. Visibly nervous and scared, CAH testified as to the events on the night of the rape from Appellant's placing his hands her shoulders and kissing her

temple to his humiliating treatment of her after the rape. She testified that Appellant forced her into her mother's bedroom, made her take off her clothes, and dance for him. She testified that Appellant forced her onto the bed and penetrated her. *Id.* at 11:47:00-12:26:15. This testimony was more than sufficient to establish and prove elements of the rape charge against Appellant. Because sufficiency of the evidence is not at issue, there's simply no reason to go into anymore detail as to CAH's account of the rape. Any other facts that are relevant and necessary are set forth in the argument below.

ARGUMENT

Appellant raises nine issues on appeal. For the convenience of the Court, the Commonwealth will address each argument in the order raised by Appellant.

I.

The Trial Court Properly Refused to Admit Hearsay Contained in a Social Worker's Report

For his lead argument, Appellant argues that the trial court erred in excluding as hearsay, the out-of-court opinion of a therapist that CAH was not being truthful about allegations of sexual abuse. This opinion testimony was contained in the notes taken by a social worker who testified at Appellant's trial. On appeal, Appellant argues that the opinion testimony was admissible under one of two hearsay exceptions. All of the applicable case law holds otherwise.

Julie Greisz was a social worker for the Kentucky Cabinet for Family and Children. VR No. 8; 11/20/07 at 5:32:40-53:00. CAH was her client in February of 2006. Id. On rebuttal, Appellant asked Ms. Greisz about notes in one of her reports that CAH's

therapist had some doubts as to the validity of CAH's accounts of sexual abuse. The Commonwealth objected and the trial court temporarily excused the jury in order to hear argument and to voir dire Ms. Greisz. *Id.* at 5:55:15-58:30.

On avowal, Ms. Greisz testified that the report did contain a notation that CAH was not being totally honest about her abuse. Ms. Greisz then explained that this was not her personal opinion but, rather, reflected CAH's therapist's assessment of CAH's veracity. The therapist, Melissa White, apparently expressed to Ms. Greisz that in her (Ms. White's) opinion, CAH was not being honest in therapy about being sexually abused but was being honest about being physically abused. *Id.* at 06:03-15-04:15. (It's not clear from the trial tapes whether Appellant committed the sexual abuse in question or it was at the hands of a different abuser.) The trial court correctly ruled that the testimony was inadmissible, *id.* at 06:06:00, because Ms. White's opinion and belief as to the veracity of CAH's abuse claims was inadmissible hearsay.

"There is no recognized exception to the hearsay rule for social workers or the results of their investigations." *Souder v. Commonwealth*, 719 S.W.2d 730, 734 (Ky. 1986) (emphasis added). While a social worker's official reports falls within the business-record exception of KRS 803(6), this does not make all the contents of those reports *per se* admissible. As explained in *Prater v. Cabinet for Human Resources, Commonwealth of Kentucky*, 954 S.W.2d 954 (Ky. 1997), "even if [a social worker's] report satisfies the foundation requirements of KRS 803(6), that does not authorize a carte blanche admission of each individual entry contained in the report." *Id.* at 958. For example, "factual observations of social workers recorded in . . . case records are

admissible under the business records exception, . . . but *the recorded opinions and conclusions* of social workers are not admissible." Id. (emphasis added).

Here, Appellant sought to introduce Ms. White's opinions and conclusions about the veracity of CAH's claims of sexual abuse. Consequently, the testimony was inadmissible and did not fall within any recognized hearsay exception. While *Souder* and *Prater* should end the discussion on this issue, the Commonwealth nonetheless addresses below Appellant's arguments as to specific hearsay exceptions.

A. Ms. White's Opinion of CAH's Veracity does not fall within the State-of-Mind Exception of KRS 803(3)

Appellant first argues that Ms. White's hearsay statements fall with KRS 803(3)'s state-of-mind exception. But KRS 803(3) does not permit introduction of hearsay statements concerning the declarant's opinion as to whether a witness is telling the truth. Nor do the cases cited in Appellant's brief.

Appellant first cites to *Hampton v. Commonwealth*, 133 S.W.3d 438 (Ky. 2004). *Hampton* is one of several cases that hold that statements of "future intent" fall within KRS 803(3)'s state-of-mind exception. Specifically, *Hampton* holds that hearsay testimony that the victim would divorce the appellant "if they lost the trailer" was admissible under KRS 803(3) because the statement "cast light upon the future as opposed to past events." *Id.* at 443 (citing *Crowe v. Commonwealth*, 38 S.W.3d 379 (Ky. 2001)). Similarly, *Crowe* holds that "[e]vidence that the victim wanted a divorce and intended to inform her husband of that fact is within the scope of KRE 803(3), because declarations of present intent cast light upon future as opposed to past events." *Crowe*, 38

S.W.3d at 383; *accord Ragland v. Commonwealth*, 191 S.W.3d 569, 587 (Ky. 2006).

So *Hampton* does not support Appellant's argument because Ms. White's opinion concerning CAH's veracity was not a statement of her or anyone else's "future intent." Rather, it was hearsay statement that Ms. White doubted the truth of CAH's claims. *Prater* expressly holds that this type of testimony is inadmissible. *Accord Bussey v. Commonwealth*, 797 S.W.2d 483, 486 (Ky. 1990) (holding that it was error to allow a police offer to testify "that he believed the victim's report of the incident and determined on this basis to initiate further investigation by telling his captain").

B. Ms. White's Opinion of CAH's Veracity does not fall within the Business-Record Exception of KRS 803(6)

Citing *Matthews v. Commonwealth*, 163 S.W.3d 11 (Ky. 2005) and *Kirk v. Commonwealth*, 6 S.W.3d 823 (Ky. 1999), Appellant argues that Ms. White's opinions as to CAH's veracity were admissible under the business-rule exception of KRS 803(6). An examination of the facts and holdings of *Mathews* and *Kirk* demonstrates that these cases are inapposite to the case at bar.

At issue in *Mathews* was the admissibility of hospital records. *Mathews*, 163 S.W.3d at 21. The records included "a transcription of notes dictated by the doctor during his examination of the victim." *Id.* These notes contained a statement by the *victim* describing her account of being raped by the appellant. *Id.* (emphasis added). The *Mathews* Court noted that "[m]edical records like those in this case generally fall under the business records hearsay exception embodied in KRS 803(6)." *Id.* at 26. So *Mathews* concerns *hearsay statements made by the victim* concerning the events of the crime. Here,

Ms. White's hearsay statements are not CAH's statements. The statements represent *Ms. White's hearsay opinion* as to the truth of CAH's claims of sexual abuse. Opinions as to a victim's veracity are inadmissible under *Prater.* Neither *Mathews* nor *Kirk* changes this result.

Indeed, *Kirk* relied on *Prater* in holding that the trial court correctly admitted a coroner's report "under the business records exception, KRE 803(6)." *Kirk*, 6 S.W.3d at 828. While the coroner's report in *Kirk* did contain the coroner's "opinions," those opinions necessarily did not opine on the veracity of the deceased victim. Rather, the opinions in question concerned the coroner's investigation into the victim's cause of death. *Id.* at 824. So *Kirk* and *Mathews* neither overrule nor modify *Prater. Prater* is directly on point and holds that a social worker's opinions and conclusions are inadmissible hearsay. Therefore, the trial court did not err in refusing to admit Ms. White's hearsay opinions questioning CAH's veracity.

II.

The Court should Decline Appellant's Invitation to Modify *Hall v. Commonwealth*

Appellant invites the Court to modify or abrogate *Hall v. Commonwealth*, 956 S.W.2d 224 (Ky. App. 1997), which holds that "the admissibility of evidence of similar accusations [of sexual abuse] made by the victim depends on whether they have been proven to be demonstrably false." *Id.* at 227. The Court should decline the invitation.

This issue arises in connection with the trial court's ruling that unsubstantiated claims by CAH that she had been sexually abused by two other persons

were inadmissible. In particular, CAH was questioned in chambers about claims that she had made to Lt. Duncan in an interview with him that two other individuals had touched her inappropriately: (1) Mr. Paul, an employee at a psychiatric hospital where she stayed for a period of time after the rape; and (2) a person named Waldo when she was five. VR No. 7; 11/20/07 at 03:30:00-41:00. She did not deny the allegations. *Id.* And defense counsel produced no argument or evidence of falsity in support of admitting the allegations. *Id.* at 03:41:00-52:35.

Relying on *Hall*, the trial court excluded evidence. *Id.* at 3:52:00-35. In so ruling, the trial court noted that *Hall* holds that "unrelated allegations which have neither been proven nor admitted to be false are properly excluded." *Hall*, 956 S.W.2d at 227. The trial court properly applied *Hall* and did not abuse its discretion in excluding the evidence. *See e.g.*, *Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996) (holding with respect to evidentiary issues, "[a] decision of a trial court will not be disturbed in the absence of an abuse of discretion"), *overruled in part on other grounds Chestnut v. Commonwealth*, 250 S.W.3d 288, 295 (Ky. 2008).

Appellant makes no argument that the trial court improperly applied *Hall*. Rather, his sole argument is that *Hall* should be modified by putting in place a different test for the admissibility of other allegations of sexual abuse by a victim in a sexual abuse case. There are two reasons why the Court should reject Appellant's argument and leave *Hall's* application of KRE 412 in place. First, Appellant fails to offer any alternative test for evaluating the admissibility of other accusations of sexual abuse by a victim or to cite to any cases setting forth a different test. Next and more importantly, *Hall* correctly

interpreted KRE 412 consistent with federal cases interpreting the identically-worded FRE 412. *Hall*, 956 S.W.2d at 227 (citing cases from the 6th, 8th, 9th, and D.C. Circuit Court of Appeals). Because KRE 412(a) and FRE 412(a) are identical, the *Hall* Court correctly looked to cases interpreting the federal rule to construe the Kentucky rule. *See e.g.*, *Taylor v. Morris*, 62 S.W.3d 377, 379 (Ky. 2001) (holding that when a Kentucky rule "mirrors" a federal rule, "federal court decisions interpreting the latter rule may be accepted as persuasive authority when examining [the state rule]"). While not all courts phrase the applicable test in terms of "demonstrably false," the clear majority rule is that an affirmative showing of falsity is a necessary prerequisite to the admissibility of similar accusations of abuse made by a sexual-abuse victim.

For example, at issue in *Quinn v. Haynes,* 234 F.3d 837 (4th Cir. 2000)–a federal habeas case–was whether exclusion of a victim's allegations of sexual abuse under West Virginia's rape-shield law violated the appellant's Sixth Amendment rights. In holding exclusion of evidence was a reasonable application of federal law even where the victim subsequently denied the allegations, the Fourth Circuit Court of Appeals noted:

> [M]ost jurisdictions that have addressed the issue similarly require more than simple denial testimony as proof that another sexual assault accusation was false. *See Hughes v. Raines*, 641 F.2d 790, 792 (9th Cir.1981) (applying a "shown convincingly" standard); *United States v. Stamper*, 766 F.Supp. 1396, 1403 n. 3 (W.D.N.C.1991), aff'd 959 F.2d 231, 1992 WL 63334 (4th Cir.1992) (requiring "substantial proof of falsity"); see also Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 Minn.L.Rev. 763, 861 (1986) (noting that "courts uniformly require that there be a strong factual basis for concluding that the prior accusation was false.)

Quinn, 234 F.3d at 851; *see also United States v. Cardinal*, 782 F.2d 34, 36 (6th

Cir.1986); *U.S. v. Withorn,* 204 F.3d 790, 795 (8th Cir. 2000) (holding that "impeaching the victim's truthfulness and showing her capability to fabricate a story are not recognized exceptions to Rule 412").

Thus, *Hall's* demonstrably-false test is consist with cases from other jurisdictions applying rape-shield laws that are identical or substantially similar to KRS 412. Therefore, the Court should not modify or abrogate *Hall.*

III.

Lt. Duncan's Testimony was Proper Rehabilitation Testimony

Lt. Duncan testified on redirect that, in his experience as a police officer for twenty years and as who had interviewed child victims, a child is sometimes reluctant to give up information and that it was not "uncommon for a child victim to tell you something and then elaborate on it later." VR No. 6; 11/19/07 at 03:18:45-20:20. On appeal, Appellant argues that this testimony improperly bolstered CAH's testimony. But the testimony was not introduced to bolster her testimony. Rather, it was properly introduced on redirect to rehabilitate her.

As made clear in defense counsel's opening statement, the defense's main theory of the case was that CAH was lying bout being raped by Appellant. In laying out his case, defense counsel began by telling the jury that CAH's story changed and escalated over time. He told the jury that she initially reported to her cheerleading coach that she was merely uncomfortable being around Appellant, which story morphed into Appellant touched her. VR No. 6; 11/19/07 at 02:53:45-54:20. Defense counsel then implied that the

Kentucky Cabinet for Families and Children planted the suggestion that Appellant had abused her in an interview. "Whether [the Cabinet] gave that suggestion to her or whether she made it up, we don't know the specifics." *Id.* at 02:54:50-55:15. Next, defense counsel directed the jury to CAH's interviews with Lt. Duncan.

After noting that Lt. Duncan interviewed her twice, defense counsel stated that CAH's story grew from being uncomfortable around Appellant to Appellant touched her inappropriately. And he emphasized to the jury that in the first interview, CAH told Lt. Duncan that Appellant touched her "only once." *Id.* at 02:55:15-55:50. After recounting some of the turmoil in CAH's life after her first interview with Lt. Duncan, defense counsel told the jury that the first allegations of rape by CAH came one year later in March of 2006. He told the jury that it was going to see the "evolution of many different stories." *Id.* at 02:58:00-30. And he concluded by saying that "ultimately this whole case is about [CAH's] credibility." *Id.* at 03:00:00-10.

Defense counsel continued his attack on CAH's credibility in his cross examination of Lt. Duncan. He brought out testimony that CAH told Lt. Duncan in their first interview that Appellant touched only once in a sexual way. *Id.* at 03:09:10-12:30. Moving on to Lt. Duncan's second interview with CAH on March 15, 2006, defense counsel brought out that this was the first time that CAH alleged that Appellant raped her. *Id.* at 03:12:30-13:10. So defense counsel was clearly attacking CAH's credibility by bringing out testimony that CAH's version of events changed between her first and second interview months later with Lt. Duncan. As result of this attack on CAH's credibility, the Commonwealth questioned Lt. Duncan on redirect about his experience with interviewing

child victims.

Lt. Duncan testified that he had been a police officer for 20 years and had experience in interviewing child victims. He then testified a child is sometimes reluctant to give up information and that it was not "uncommon for a child victim to tell you something and then elaborate on it later." VR No. 6; 11/19/07 at 03:18:45-20:20. This testimony was admissible to rehabilitate CAH after defense counsel's attack on her credibility.

Kentucky law is clear that, after a witness's credibility has been attacked, the witness can be rehabilitated in rebuttal. *See e.g.*, *Reed v. Commonwealth*, 738 S.W.2d 818, 821 (Ky. 1987). Here, Lt. Duncan's testimony in question came on redirect only after CAH's credibility had been attacked twice: first in defense counsel's opening statement and then again during Lt. Duncan's cross examination. Granted, Lt. Duncan's testimony did not consist of a prior consistent statement by the victim, CAH, as was the case in *Reed*, but his testimony was relevant, and, hence, admissible.

"Relevant evidence" is defined "as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRS 401. Here, CAH's credibility was the main issue at trial. Evidence that explained to the jury why she might have given Lt. Duncan a more detailed statement in her second interview was probative to the main issue at trial: CAH's credibility. It's important to note that Lt. Duncan's testimony in question went to his experience with interviewing child victims in general. The testimony in no way vouched for CAH's testimony in particular. There was no error in

admitting the testimony. But in the event that the Court concludes otherwise, the Court should hold the error to be harmless. RCr 9.24.

The testimony in question was extremely brief. More importantly, in light of CAH's clear and unequivocal testimony that Appellant raped her, the chances are very remote that Lt. Duncan's observations of child victims he'd interviewed in the past contributed to the jury's verdict against Appellant. *See Jarvis v. Commonwealth*, 960 S.W.2d 466, 471 (Ky.1998) (holding that "[t]he relevant inquiry under the harmless error doctrine is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction").

IV.

Miscellaneous Evidentiary Arguments

A. Introduction of the Tape Recording of Mr. Patterson's Message was not Palpable Error

Appellant argues that the trial court erred in playing for the jury, a tape of phone messages that Appellant left on the answering machine of the biological father of SP and CP. He claims the taped statements were not relevant, were more prejudicial than probative, and consisted of impeachment on a collateral matter. Because none of these were argued as grounds against introduction of the taped statements at trial, the alleged error is unpreserved and subject to a palpable-error review.

i. Portion of Tape Played without Objection

Appellant argues that the trial court erred in playing a tape of phone messages that Appellant left on the answering machine of the biological father of SP and

CP. The Commonwealth introduced the tape because Appellant made statements on the tape that were contrary to his testimony at trial. Specifically, the tape contradicted Appellant's testimony that he never asked Ms. Stevenson's children to call him Daddy. When the Commonwealth moved to introduce the tape through the biological father, defense counsel stated that "I guess I can't really object to it." VR 8; 11/20/97 at 06:15:00-05. So as initial matter, the issue as to playing the tape is unpreserved, which is subject to a palpable-error review under RCr 10.26. This raises the question of what standard of review to apply after an objection was made. The answer in large part turns on the stated grounds for the objection.

ii. Portion of Tape Played after Objection

After about four minutes of playing the tape, defense counsel did object to playing the whole tape and argued that "I think that the tape should be limited to the cross examination question as to whether he said certain words." *Id.* at 06:19:15-25. At this point, most, if not all, of the damage to which Appellant complains of on appeal was already done. The jury heard four minutes of the tape, which consists Appellant's slurred and rambling speech.

At the bench conference on defense counsel's objection to playing the whole tape, the trial court speculated that this might be impeachment on a collateral matter. Defense counsel parroted this concern, but did not object to playing the tape on this ground. Nor did defense counsel object to playing the tape on relevancy grounds. Rather, he asked the Commonwealth attorney to simply solicit the statement in question through the witness's testimony rather than via the audiotape. VR 8; 11/20/97 at 06:19:30-

20:20. After some discussion, the Commonwealth agreed to ask the witness to fast forward the tape to the relevant portion, which the witness did by fast forwarding and playing snippets of the tape in an effort to find the portion of the tape in question. *Id.* at 06:21:30-26:40. So Appellant received the relief he requested on his objection to playing the whole tape. The whole tape was not played and the witness did the best he could to find the pertinent part of the tape.

When the witness found what he believed to be the correct part of the tape, the tape was again played for the jury. After three or four minutes, defense counsel objected on grounds that the portion of the tape played for the jury did not contain any statement that Appellant referred to himself as "Daddy." The Commonwealth assured the court that the statement was on tape. Defense counsel replied that if the statement wasn't on the tape, then it would be a matter for a mistrial. *Id.* at 06:26:45-27:30. The witness, counsel, and the judge then went into chambers to review the tape. While a review of the tape did uncover the statement at issue, the judge decided not to allow any more of the tape to be played for the jury on grounds that it was impeachment on a collateral matter. *Id.* at 06:28:20-06:36:30.

iii. Palpable-Error Review Applies

Here, we have around eight minutes of audio tape played for the jury. The tape consists of rambling, drunken messages left by Appellant. The first four minutes of the tape were played without objection. Any error to playing the tape during this time is subject to a palpable-error review. The same review applies to the remaining portion of the tape played to the jury as well.

After four minutes of playing the tape for the jury, Appellant objected to playing the whole tape and asked that the tape be limited to the pertinent portion of the tape. Appellant received this relief. And while defense counsel argued that the tape consisted of impeachment on a collateral matter, he did not object to playing the tape on this ground. So Appellant's arguments on appeal that the tape is not relevant, that playing tape was more prejudicial than probative, and that consisted of impeachment on a collateral matter are all unpreserved for review. Thus, these alleged errors are subject to a palpable-error review under RCr 10.26.

As recently explained by this Court, "[t]o discover manifest injustice [under RCr 10.26,] a reviewing court must plumb the depths of the proceeding . . . to determine whether the defect in the proceeding was shocking or jurisprudentially intolerable." *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006). The error, if any, in admitting Appellant's taped statements do not rise to this high level.

In his direct testimony, Appellant first raised the issue of the tapes and the messages that he left on the tapes. VR 7; 11/20/07 at 05:31:00-15. Prior to being played, Appellant admitted on the stand that he had been charged of harassment in connection with the tapes. *Id.* at 05:31:30-05:32:05. The tapes contained no incriminating statements as to the crime charged. Rather, the tapes were played to impeach Appellant's direct testimony. Consequently, allowing the jury to hear Appellant's own recorded statements was neither shocking nor jurisprudentially intolerable.

B. Dr. Shumaker's Testimony was Admissible

Dr. Shumaker was tendered and accepted by the trial court as an expert on

pediatrics and examinations for sexual abuse. VR 6; 11/19/07 at 05:05:15-35.Admission of expert testimony is left to the sound discretion of the trial court and is subject to an abuse-of-discretion review. *See e.g.*, *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004).

Appellant argues that the trial court abused its discretion because Dr. Shumaker's examination of CAH was too remote in time and lacked meaningful findings. This argument is contrary to *Davis v. Commonwealth*, 147 S.W.3d 709 (Ky. 2004), which holds that "[g]enerally, temporal remoteness is a factor in determining admissibility but is not grounds for exclusion; remoteness bears more heavily on weight than on admissibility." *Id.* at 725. Moreover, "the objection that evidence is too remote goes to the credibility of the evidence rather than to its admissibility, unless the remoteness is so great that the proffered evidence has no probative value at all." *Scruggs v. Commonwealth*, 566 S.W.2d 405, 409 (Ky. 1978). So only if Dr. Shumaker's testimony had absolutely no probative value could there any possible error in admitting his testimony. Here, Dr. Shumaker's testimony was probative, and, therefore, there was no abuse of discretion in admitting the testimony.

When testing the probativeness of evidence, the

> evidence must be tested by the general rule of relevancy, i.e., whether it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRS 401. (Emphasis added.) A "fact that is of consequence to the determination of the action" includes not only a fact tending to prove an element of the offense, but also a fact tending to disprove a defense. Relevancy is established by any showing of probativeness, however slight.
>
> An item of evidence, being but a single link in the chain of proof, need not prove conclusively the proposition for which it is offered. It need

> not even make that proposition appear more probable than not. . . . **It is enough if the item could reasonably show that a fact is slightly more probable than it would appear without that evidence.** Even after the probative force of the evidence is spent, the proposition for which it is offered still can seem quite improbable.

Springer v. Commonwealth, 998 S.W.2d 439, 449 (Ky. 1999) (internal block quoting and citations omitted, and emphasis added).

Here, Dr. Shumaker testified that he examined CAH in March of 2006. VR 6; 11/19/07 at 05:15:35-45. He explained that he found that there were remnants left of CAH's hymen. He discovered a cleft in the hymen that was compatible with penetration. *Id.* at 05:09:40-10:40. This testimony was probative on two fronts: (1) Dr. Shumaker's testimony tended to show that CAH had been abused, and (2) his testimony also tended to disprove Appellant's defense.

Dr. Shumaker's testimony was probative on CAH's claim that she had been raped, because Dr. Shumaker testified that the injury to her hymen was consistent with penetration. The testimony was probative on disproving Appellant's defense because it showed that penetration might have occurred. Appellant's defense was that he never violated CAH. Evidence tending to show that CAH had been penetrated undercut Appellant's defense to some degree. That is, a medical exam that revealed no signs of penetration would have supported Appellant's defense. So *a priori*, evidence supporting a finding that CAH had been penetrated undermined Appellant's defense. So Dr. Shumaker's testimony meets *Springer's* test of relevance.

Whether penetration occurred was a fact of consequence to the

determination of the action within the meaning of *Springer.* At the very least, the fact of penetration was made slightly more probable with Dr. Shumaker's testimony than without it. Therefore, there was no abuse of discretion and, hence, no error in allowing Dr. Shumaker to testify.

C. Appellant's Requested Admonishment Cured any Error in Connection with Charles Johnson's Testimony

On appeal, Appellant argues that the trial court erred in allowing Charles Johnson to testify because Mr. Johnson's testimony was not relevant and "consisted wholly of uncharged and unrelated bad acts." *Appellant's brief* at 23. But at trial, he initially objected to Mr. Johnson's testimony on grounds that the Commonwealth failed to timely disclose Mr. Johnson as a witness. VR 6; 11/19/07 at 09:57:15-58:15. And during Mr. Johnson's testimony, defense counsel moved for a mistrial on grounds that Mr. Johnson referred to "kids," which counsel argued implied to the jury that Appellant had abused children other than CAH. *Id.* at 04:36:45-37:15.

So this is a case where Appellant fed "one can of worms to the trial judge" and is trying to feed "another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976)."A defendant cannot pursue one theory at the trial court level and another on the appellate review." *Commonwealth v. Duke*, 750 S.W.2d 432, 433 (Ky. 1988). So there is no question properly before the Court in connection with this issue. In other words, there is no error to review. But in abundance of caution, the Commonwealth will briefly address the only issue

of merit raised at trial in connection with Mr. Johnson's testimony, *i.e.*, whether the trial court erred in denying Appellant's motion for a mistrial.

"A manifest necessity for a mistrial must exist before it will be granted." *Martin v. Commonwealth*, 170 S.W.3d 374, 381 (Ky. 2005). Here, the asserted ground for a mistrial was Mr. Johnson's use of the plural "kids" rather than the singular "kid." After the trial court denied his motion for a mistrial, defense counsel asked for an admonishment in the form of a question by the Commonwealth clarifying that Mr. Johnson's testimony only related to a single child. The Commonwealth complied and cleared the matter up in subsequent questioning. So Appellant received the relief he asked for in *lieu* of a mistrial. More importantly, this relief cured any error in connection with Mr. Johnson's testimony. *See Clay v. Commonwealth,* 867 S.W.2d 200, 204 (Ky.App. 1993) (holding that "[i]t is ordinarily presumed that an admonition controls the jury and removes the prejudice which brought about the admonition]").

Under these circumstances, there was no manifest necessity for granting a mistrial. There was no error.

D. The Trial Court Properly Admitted Testimony Regarding Appellant's Affection for Playing Particular Songs

On direct examination, Ms. Stevenson, CAH's mother and Appellant's live-in girlfriend, testified that Appellant liked to listen to "Jokerman," a song by Bob Dylan and a song called "Red House," by an unidentified artist. VR 7; 11/20/07 at 11:21:10-11:23:45. CAH testified that Appellant played the song "Jokerman" before and after Appellant raped

her. *Id.* at 02:19:30. Consequently, Ms. Stevenson's testimony was admissible corroboration testimony. Appellant argues that the testimony unfairly bolstered CAH's testimony but this argument confuses "bolstering" with "corroboration."

The type of bolstering condemned in cases like *Bussey* and *Prather* concerns testimony by others repeating hearsay statements by the victim and testimony concerning a victim's veracity. But Ms. Stevenson did not testify that CAH told her that Appellant played the song Jokerman. Rather, her testimony was based totally on her own experiences with Appellant. The testimony corroborated CAH's testimony by providing independent, probative evidence that was consistent with CAH's testimony on a rather minor point of the details of the rape. The testimony was admissible in the same way as testimony concerning what a defendant in an robbery case was wearing on the day of an alleged robbery is admissible to independently corroborate a victim's testimony as to what the perpetrator was wearing at the time of the robbery.

Thus, Ms. Stevenson's testimony that Appellant liked to listen to "Jokerman" and "Red House" did not unfairly bolster CAH's testimony. Therefore, the trial court did not err in denying the objection to the testimony on the grounds presented.

V.

The Trial Court Never had Cause to Question Appellant's Competency

The trial court entered an order requiring Appellant undergo a psychiatric examination in order to determine his competency to stand trial. TR Vol. I at 48-49. Appellant was examined but he waived the competency hearing. VR No. II; 3/28/07 at

1:02:00-04:35. Nonetheless, the trial court stated that it would hold a hearing on the issue of Appellant's competency. *Id.* Apparently, the hearing was never held. Also, it appears that the psychiatric report was never filed with the trial court because no such report appears in the record and no other reference to the report is made on the record.

On appeal, Appellant argues that a competency hearing was required under KRS 504.100, and that the failure to hold a hearing constitutes reversible error. Because the psychiatric report was never filed, the trial court's duty under the statute to hold a competency hearing never arose. *See e.g.*, *Mills v. Commonwealth*, 996 S.W.2d 473, 486 (Ky. 1999) (holding that holding a competency hearing is mandatory under KRS 504.100(3) "after [a psychiatric] report is filed" (emphasis added)). So not holding a competency hearing did not violate the statute. Because the trial court never had reason to question Appellant's competency to stand trial, there was no constitutional violation either.

Under *Mills*, "once facts known to a trial court are sufficient to place a defendant's competence to stand trial in question, the trial court must hold an evidentiary hearing to determine the question." *Mills*, 996 S.W.2d at 486 (citing *Drope v. Missouri*, 420 U.S. 162, 180 (1975); *Pate v. Robinson*, 383 U.S. 375, 385-86 (1966)). The Court then explained that "[e]vidence of a defendant's irrational behavior, his demeanor in court, and any prior medical opinion on competence to stand trial are all relevant facts for a court to consider." *Id.* Like in *Mills*, facts never arose in this case to place Appellant's competency at issue. So no competency hearing was required under either the U.S. or Kentucky Constitutions.

The record is clear that the trial court never questioned Appellant's

competency to stand trial. Rather, Appellant's first trial counsel raised the issue of competency early on in the case in the form of a motion for a psychiatric examination. TR Vol. I at 47. So obviously, the trial court did not order a psychiatric evaluation based on its observations of Appellant. Instead, like in *Mills*, the trial court ordered the evaluation in response to defense counsel's motion. *Id.* at 48. Next, the trial court had considerable opportunity to observe Appellant both in pretrial hearings and at trial. At no point did Appellant behave in such a way as to create a concern as to his competency to stand trial. More importantly, at no point did the trial court ever express any concern as to Appellant's competency to stand trial. Therefore, a "review of the record" demonstrates that Appellant "has failed to establish any factual basis which should have caused the trial court to experience reasonable doubt as to [Appellant's] competence to stand trial." *Mills*, 996 S.W.2d at 486. Therefore, any error in failing to hold a competency hearing was harmless. *Id.* RCr 9.24.

VI.

There was no Prosecutorial Vindictiveness

Appellant argues that he was subjected to prosecutorial vindictiveness in connection with his refusal to plead guilty to sexual abuse. According to Appellant, during plea negotiations, the Commonwealth offered four years on the charge against him. *Appellant's brief* at 28. Appellant then claims that the Commonwealth attorney prosecuting his case warned Appellant that he would be indicted for rape if he refused the offer. *Id.* Assuming *arguendo* that Appellant's version of events is entirely true, these allegations do not support his claim of prosecutorial vindictiveness, because the due process concerns

underlying prosecutorial vindictiveness simply are not present in the context of plea bargaining.

As aptly explained in *Corpus Juris Secundum*:

> In the give-and-take of plea bargaining . . . there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer. Accordingly, ***the Due Process Clause does not prohibit a prosecutor from carrying out a threat, made during plea negotiations, to bring additional charges against an accused who refuses to plead guilty to the offense with which he or she is originally charged,*** since the course of conduct engaged in by the prosecutor, which no more than openly presents a defendant with the unpleasant alternatives of forgoing trial or facing charges on which he or she is plainly subject to prosecution, does not violate the Due Process Clause.

16C C.J.S., *Constitutional Law,* § 1531 (citing *inter alia Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (emphasis added)); *see also Commonwealth v. Leap*, 179 S.W.3d 809, 814 (Ky. 2005) (holding that "[t]he prosecution has an obligation to the Commonwealth to properly charge and convict persons guilty of criminal conduct as defined in our Kentucky Statutes").

In this case, Appellant alleges that he was subjected to prosecutorial vindictiveness during plea negotiations when the Commonwealth Attorney carried out his promise to charge him with rape after Appellant refused the Commonwealth's plea offer. Under *Bordenkircher* and *Leap*, this does not violate the Due Process Clause. There was no prosecutorial vindictiveness. There was no error.

VII.

The Trial Court Properly Denied Appellant's Motion to Dismiss the Indictment

Appellant argues that he was denied due process of law in connection with

the Commonwealth's failure to timely disclose useless information. Consequently, Appellant's claim that the trial court erred in denying his motion to dismiss the indictment against him for failure to timely provide him with a copy of the grand jury proceedings is the height of putting form before substance.

According to Appellant, the Commonwealth was tardy in providing the defense with a copy of the grand jury proceedings. But he concedes that the Commonwealth did provide a copy of the grand jury tape on August 30, 2007, which was about three weeks before his trial. *Appellant's brief* at 32. Moreover, Appellant claims that the copy he received "was of such poor quality that it was useless." *Id.* at 33. On appeal, Appellant provides no argument or claim that a better quality of tape exists. Nor does he even allude to the possibility that anything that might be on the tape was in the least bit exculpatory. Rather, Appellant relies on delay in providing the tape as his sole grounds for his due process argument. Appellant's claim of right to reversal without any showing of prejudice is not well taken.

"No conclusion of prejudice . . . can be supported by mere speculation." *Jackson v. Commonwealth*, 20 S.W.3d 906, 908 (Ky. 2000) (quoting *Kinser v. Commonwealth*, 741 S.W.2d 648, 653 (Ky. 1987)). Here, Appellant doesn't even bother to speculate as to prejudice. He merely claims error. Just as is the case with negligence, "[p]roof of [trial court error] in the air, so to speak, will not do." *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 99 (N.Y. 1928). To be reversible error, there must also be a showing of prejudice flowing from the error. Consequently, regardless of whether the Commonwealth should have turned over a copy of the grand jury tape earlier, there was no prejudice to

Appellant flowing from the disclosure. And without prejudice, there can be no error in the trial court's denial of Appellant's motion to dismiss.

VIII.

Appellant is not Entitled to an Evidentiary Hearing in Connection with Allegations of Irregularities with his Pre-Sentence Investigation Report

The trial court had before it the signed pre-sentence investigation report required by KRS 532.050 when it sentenced Appellant. *See* VR 3; 1/28/08 at 12:10:00-11:00. Consequently, he was sentenced according to the statutory requirements. On appeal, Appellant argues that the Commonwealth failed to properly evaluate him because he was not given a face-to-face interview in connection with the comprehensive sex offender pre-sentence evaluation required by KRS 532.050(4). This argument is based on his unsubstantiated claim at sentencing that he was not personally evaluated.

KRS 532.050 sets forth no basis for challenging the *preparation* of either the pre-sentence report or the comprehensive sex offender pre-sentence evaluation. Rather, the statute only provides the right to challenge the contents of the report: "[T]he court shall advise the defendant or his counsel of the factual contents and conclusions of any pre-sentence investigation or psychiatric examinations and afford a fair opportunity and a reasonable period of time, if the defendant so requests, to controvert them." KRS 532.050(6). Here, Appellant did not request an opportunity to controvert the contents of the pre-sentence report.

Similarly on appeal, Appellant fails to identify how the alleged error in

preparing the report prejudiced him. More importantly, he fails to explain what relief would be available to him at the evidentiary hearing he seeks. Consequently, Appellant fails to present the Court with a cognizable claim for relief.

IX.

Appellant Received a Fundamentally Fair Trial

In his final, catch-all argument, Appellant argues that cumulative error denied him due process of law. As explained above, the alleged errors complained of either did not occur or were unpreserved. Therefore, this final argument is without merit.

CONCLUSION

As occurs with all too sickening frequency, Appellant was sexually attracted to the daughter of his live-in girlfriend. When the opportunity arose, he gave in to his lust and raped the thirteen year-old girl. On appeal, he raises nine allegations of error. He first argues incorrectly that a therapist's opinions as to CAH's veracity contained in a social-worker's report fall within a recognized hearsay exception. He next urges the Court to change the standard for admitting other allegations of sexual abuse under KRS 412 without offering any alternative standard. Next, he vainly claims that his right to attack CAH's credibility should be free of any corresponding right of the Commonwealth to rehabilitate her credibility. Next, he makes a number of attacks on the admission of various pieces evidence at trial. None of these attacks are well taken.

As to the audiotape of his phone messages, defense counsel initially conceded the admissibility of the tape. When he did object to the playing of the tape, he was given the relief he asked for. As to Dr. Shumaker's testimony, Dr. Shumaker's

testimony was relevant and probative to prove that CAH had been penetrated and to rebut Appellant's defense that no sexual contact with CAH ever occurred. And as to the testimony of Charles Johnson, Appellant makes a different argument on appeal than he presented to the trial court. On appeal, he argues lack of relevance and impeachment on a collateral matter. But at trial, he argued he was entitled to a mistrial. The trial court correctly denied the mistrial because there was no manifest necessity for granting it. Moreover, the trial court did give Appellant the alternate relief he requested in terms of directing the Commonwealth to ask Mr. Johnson admonishing questions.

Next, there can be no prosecutorial vindictiveness in the context of plea negotiations. Next, while no competency hearing was held in this case, the error, if any, was harmless because there is no indication on the record that the trial court ever had cause to question Appellant's competency to stand trial. Next, Appellant was not entitled to an evidentiary hearing on claims of irregularities in the preparation of pre-sentence investigation report where there were no claims that any of the information in the report was incorrect. Finally, there is no cumulative error in this case.

Therefore, the Court should AFFIRM the judgment of the Fulton Circuit Court.

Respectfully submitted,

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